

# Juvenile & Family Court JOURNAL

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## Resolving the Ethical, Moral and Social Mandates of the Juvenile and Family Court

*By Key Issues Curriculum Enhancement Project Faculty Consortium*

## Pay Now So You Won't Pay Later: The Effectiveness of Prevention Programming in the Fight to Reduce Delinquency

*By Pamela S. Howitt, Ph.D. and Judge Eugene Arthur Moore*

## Influence of Juveniles' Race on Police Decision-Making: An Exploratory Study

*Richard Sutphen, MSW, P. David Kurtz, Ph.D. and Martha Giddings, Ph.D.*

National Council of Juvenile and Family Court Judges

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# Juvenile & Family Court Journal

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# *Juvenile & Family Court*

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# Resolving the Ethical, Moral and Social Mandates of the Juvenile and Family Court

by the Key Issues Curriculum Enhancement Project Faculty Consortium

## The Code of Judicial Conduct: A Juvenile and Family Court Perspective

### Introduction

The Key Issues Curriculum Enhancement Project is designed as an ongoing effort to increase the capacity of the Council and its National College of Juvenile and Family Law to understand and respond to issues having a significant impact upon juvenile and family courts. Based on the efforts of a core group of faculty serving as a "Consortium," in addition to ex-officio participants, Council leadership and staff, the report reflects the intensive scrutiny to which issues have been subjected. Our recommendations are made to the Council membership, as well as to other juvenile and family court judges, general trial and appellate judges and juvenile justice and judicial education practitioners throughout the nation.

This project was funded by the State Justice Institute and the work was done in 1989-1990. This report was drafted by a select consortium of juvenile and family court judges. The mission of the project was two-fold: to examine three broad areas of potential conflict with the Code of Judicial Conduct encountered by juvenile and family court judges—judicial leadership, ex parte information, and bias; and to suggest amendments, deletions, revisions to the Model Code of Judicial Conduct (1990) that specifically addressed the ethical needs of juvenile and family court judges. During the course of the project, the American Bar Association began work on redrafting the Code of Judicial Conduct. The consortium provided them with a copy of our proposed amendments, deletions, revisions. All of our

ideas were considered; some of our suggestions were adopted.

Juvenile and family court jurisdictions number over 3,000 and require more than 7,000 judges and referees, and 100,000 administrative service and support personnel. Each year they order 1.3 million delinquency dispositions, hear 390,000 child abuse or neglect cases, review an estimated 600,000 continuing protective service orders, preside over 1.3 million divorce and legal separations and determine the custody of 2.6 children. In addition, they hear countless cases involving paternity, child support, adoption, family violence, civil commitment, and various child emancipation issues. Courts with juvenile and family jurisdiction have enormous responsibilities to those they serve. Their functions are varied, complex and understood differently by scholars, policy-makers, and practitioners. Their authority to carry out their functions often is not clear, often not statutorily explicit, and often interpreted in different ways by others. Many judges are rotated into juvenile or family court benches or divisions of general trial courts without either experience or expertise in a very specialized area of judicial practice. Such a position requires an involvement in social policy and executive branch responsibilities far beyond what most judges new to juvenile and family court practice ever anticipated.

Publication of this Journal issue provides the opportunity for judges and practitioners, nationally, to take a look at some crucial ethical, moral and social issues confronting juvenile and family court judges.

Prepared under Grant Award SJI-88-02B-C-055 from the State Justice Institute, Alexandria, Virginia. Points of view or opinions expressed in this document do not necessarily represent official position or policies of the State Justice Institute.

We are not aware of any other national process for gauging the potential, analyzing responses, and developing such an organizational, practitioner-oriented approach from the perspective of experienced juvenile and family court judges.

We think there exist some formidable hurdles to confront before a full utilization of the judicial role, within the governmental system, and within society, can be realized. The examination of ethical, moral and social mandates of the juvenile and family court judge -- from the perspective of judges themselves -- touches upon the most crucial workings of our juvenile and family court systems.

In the rush of daily judicial and administrative burdens, the juvenile or family court judge often does not find the necessary time to reflect upon the impact such issues may have upon the future and potential improvement of his or her own court process. Likewise, floating as they do a distance away from traditional judicial education curriculum, these issues have not received a deserved integration into an ongoing juvenile and family court training effort. This is particularly true with a topic as seemingly esoteric as "ethical, moral and social mandates." Although we see our recommendations as both desirable and potentially possible within state judicial or legislative process, time and expertise is not available to do more than provide a general framework of ideas. Further refinement and adaptation of the recommendations is dependent upon dedicated judges, legislators, and other public officials within individual jurisdictions, and at the national level, within the American Bar Association and its efforts to revise and update its model Code of Judicial Conduct.

We met formally as a Consortium on three occasions to review project progress. We also conducted an open forum during the 52nd NCJFCJ Annual Conference. Our goal was to elicit information, opinion, and guidance from Council membership. Our recommendations should serve as guideposts for the design and preparation of enhanced curricula to be provided by the Council's National College of Juvenile and Family Law. In addition, both the report and the curricula on the ethical, moral and social mandates of the juvenile and family court will be widely disseminated outside the Council for use by other national and state judicial leaders and educators. We hope, also, that they will serve as a starting point for the drafting and wide approval of

## **Ethics and Juvenile/Family Justice**

If I'm having trouble parenting my son, why can't I call a juvenile court judge for advice? When I'm a party in the midst of a messy divorce, why can't I call a family court judge to get some matters straightened out? I'm a judge in a small rural community and I hear all the local gossip. How much of this "scuttle-butt" can enter into my decision-making?

Little exists to guide the specific "ethics" of the juvenile and family court judge beyond the existing language of the respective Canons. Annotations, commentary, case law and advisory opinions of state judicial conduct and disciplinary organizations offer little further interpretation. The Canons state broad guidelines. Individual judges must make individual decisions within the scope of the Canons. These initial concerns give impetus to the need for the Council to further examine and analyze the issues posed -- not only in the context of ethical or judicial conduct concerns as expressed in the Canons, but also within the generally recognized framework of the social or moral mandate of the juvenile and family court.

The ethics of judicial conduct may be described as a way to balance conflicting moral imperatives. "Ethics" is defined by Webster as "the study of standards of conduct and moral judgement."<sup>1</sup> In its broadest sense, morality is then defined as "rightness or wrongness, as of an action; being in accord with the principles or standards of right conduct."<sup>2</sup> Are judges so immersed in the everyday "discernment of the rightness or wrongness of an action" that they might be considered experts on the topic?

## **Is Ethical Behavior Moral Behavior?**

In its broadest sense, ethical behavior is moral behavior and vice versa. Yet, when referring to the various codes and concepts of professional ethics, sometimes there appears to be a line between what is indeed "moral" behavior and what is "professionally" ethical. Further, behavior that is judged moral or ethical by the doer is often perceived as amoral or anti-ethical by others. For example, is it the role of defense counsel in a juvenile case to get his client off or to speak in the best interests of the child? Can the Canon's restrictions on "quasi" or "extra" judicial activities in fact be in conflict or tension with the judge's responsibilities to protect children's best

interests or to obtain children's resources?

In such a case, a judge may feel forced to distinguish between the higher moral or social good and a less understanding professional ethic. This tension surfaces, for example, when a judge is ethically unable to raise funds for a Boys' Club, even though it is a worthy cause. Then, again, a different judge may choose to adhere to the narrowest interpretation of professional ethics and never engage in leadership in any form beyond a judicial and strictly adjudicative role.

Concerns involving the considerable fine points of judicial ethics as found in the ABA Canons may pale in the light of such fundamental issues as perceived judicial responsibilities for children's best interests and community expectations. Some judges have indicated a narrowness of vision in existing professional judicial standards of conduct.

### Juvenile/Family Court Judges Must Provide Leadership

Professor Mark Harrison Moore, of the Harvard University John F. Kennedy School of Government, states in a recently published volume:

"... The only institution that can reasonably exercise leadership on behalf of the society and the children is the juvenile court. The reason is simply that no other institution can claim to have an equally broad view of all the interests at stake, to have as wide a range of action, or to be able to make decisions that are designed to reflect the values of this society as expressed in its laws and constitution."<sup>3</sup>

Also on point are some Standards of Judicial Administration adopted by the Judicial Council of California, effective July 1, 1989. The relevant sections are as follows:

a. *Section 24(b)(1), which states:*

"The presiding judge of the juvenile court...should motivate and educate other judges regarding the significance of juvenile court."

b. *Section 24(d)(1), (3), (4), and (5) which state:*

"Judges of the juvenile court...are encouraged to:

1. Provide active leadership within the community in determining the needs and obtain-

ing and developing resources and services for at-risk children and families.

3. Exercise their authority...to review, order and enforce the delivery of specific services and treatment for children at risk and their families.

4. Exercise a leadership role in the development and maintenance of permanent programs of interagency cooperation and coordination among the court and the various public agencies that serve at-risk children and their families.

5. Take an active part in the formation of a community-wide network to promote and unify private and public sector efforts to focus attention and resources for at-risk children and their families."

Recognition by academia of the social/moral mandate of the juvenile court is gratifying to most juvenile/family court judges. Numerous Council publications have elaborated on the leadership role of the juvenile and family court. Nonetheless, there appear to be considerable obstacles to the attainment of such an expanded role for the juvenile and family bench. These obstacles present us with an issue of wide breadth and great magnitude -- Resolving the Ethical, Moral and Social Mandates of the Juvenile and Family Court.

### Judicial Role Factors

The "role factors" within which a juvenile/family court judge must work include personal moral choices; legal obligations -- both constitutional and statutory; professional expectations; and most vitally, the expectations of the community which are often considerable, particularly if the judge is elected. Herein lies the dilemma: Since *Gault*,<sup>4</sup> the traditional "parens patriae" model of juvenile justice has assimilated itself into a system of legal advocacy with but slight clinical overtones. So on one hand, judges are held accountable to a general Canon of judicial ethics and legal expectations. On the other one hand, community, or even legislative, perceptions and expectations of the historic "clinical" role of the juvenile or family court have never been put to rest.

The expectation of judicial pro-active leadership and activism for children and their families called for by Professor Moore, contrast with the limitations provided by Canon 4 ("A judge shall so conduct the



judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations") and the more traditional role of the impartial judge. Even as tempered by Canon 4 (B) ("A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code."), Canon 4 has often been cited as a reason *not* to be a leader within the community or active for children's "best interests".

As Professor Moore points out:

"The lack of a coherent, durable mandate for juvenile justice also makes difficult long-term investments and sustained experimentation—there is little incentive for anyone to make an investment ..."<sup>5</sup>

The recently enacted Section 24 of California Standards of Judicial Administration provide such a coherent, durable mandate for the juvenile court.

The "consequence of the weakened mandate" (weakened from the right by a just-deserts model and lack of belief in treatment for juveniles and from the left by an adversarial insistence upon the "rights of children" over the rights of society), Moore says, "is a loss of morale, initiative, self-confidence, and responsibility among the people who run the institutions."<sup>6</sup>

### ***Judges Must Respond to the Mandate***

Primary on Professor Moore's list of those who can and must respond to the mandate are the "judges who hear the case and make the dispositions."<sup>7</sup> However, judges shouldn't be placed in the position of ignoring the Canons or ignoring the mandates. Before an individual judge can feel sufficiently empowered and publicly mandated to take a leadership role for and draw together (by judicial order if necessary) the resources essential for children and thus to better define an expanded judicial role, judges themselves must examine, analyze, and come to terms with the Canons. The many ramifications of an appropriate role for the juvenile and family court judge may become apparent once presented to the full view and comment of Council membership and the judicial community in general.

However, the issues posed above, unless more clearly delineated and resolved from the perspective of those who sit daily on the juvenile and family court bench, cannot help but delay and hinder both judicial

and public acceptance of the potential role of our courts in society.

This report will examine and offer initial recommendations on three broad areas of potential conflict with the Canons:

1. **Judicial Leadership** – Exercising a proper judicial leadership role within the community to provide for better services for children and their families.
2. **"Ex Parte" Information** – The judicial obligation to be impartial and to avoid the appearance of partiality versus receiving particular information or communications concerning a pending/impending proceeding.
3. **Bias Issues** – Mitigating or eliminating all forms of real or perceived bias within the judicial system, including disproportionate access to services based on race, disability, gender, or economic status - or the appearance of such bias.

## **Three Broad Areas of Conflict with the Canons**

### ***Judicial Leadership***

The Canons seem to discourage judges from taking an active leadership role in the community in spite of public expectations or the needs of children who come before the court. Initiation of Court-Appointed Special Advocate (Guardian-ad-litem), Sex-Offender Treatment, Volunteer Probation, Drug and/or Alcohol Abuse, Mental Health and other programs which provide services to the court might be interpreted as active fundraising or as leadership other than that permitted by Canon 4. Judges are, for example, precluded from sitting on the boards of institutions which appear regularly before them. Our brief survey of cases and state judicial conduct organization's advisory opinions reveals varying interpretations of this restriction.

The judge may also have an ethical responsibility, as part of his leadership role, to appoint a guardian-ad-litem who can advise the defense attorney and court of a child's best interests, as opposed to the defense attorney's perception of the child's best interests. The child's best interests include more than just having his due process rights protected and

getting off without punishment. They also include obtaining for the child the reasonable and necessary services or treatment required for rehabilitation as demonstrated by the evidence. Often the parent's attorney or the attorney retained by the parents represents the parents' and not the child's interests.

Indeed, the majority of juvenile and family court judges in a recent sample survey question a narrow interpretation of the Canons with regard to such special judicial duties. They do not want to limit community expectations or inhibit a judge's choice to be active in systems improvements as part of widening judicial responsibilities.

Judicial concern with conflict between the moral role of the court and Ethics Code requirements is described in the following survey responses:

- Community expectations, often including an electorate, that the juvenile/family court should serve as a "cure" or "clinic", in spite of post-Gault legal/professional obligations.
- Lack of time or other limitations on engaging in "activities to improve the law, legal system and the administration of justice" (Canon 4[B])
- Legal, professional expectations that the juvenile/family court must abide by the same formality and due process as available in adult courts, in spite of community expectations for a continuing "parens patriae" role.
- Requirement to "regulate extra-judicial activities to minimize risk of conflict with judicial duties" (Canon 4)
- Legal/professional expectations that the judge avoid perceptions of partiality by *not* speaking out.
- Community expectations that judges of juvenile or family court "speak-out" and "do something" on issues involving delinquent or abused/neglected children.
- Unavailability, due to requirement of "prompt disposition of the court's business." (Canon 3 ABA Commentary).
- Requirement that a judge be "unswayed by partisan interests." (Canon 3(B)[2])

### **Ex Parte Information**

Ex parte information is defined as both public

and private information or communication which a judge receives when one or both parties are not present. For example, a juvenile court judge may be "advised" by a neighbor: "You've got Johnny Jones coming in front of you. Really throw the book at him." Or a family court judge may be in the middle of deciding a divorce case and learn that one of the parties to the proceedings is having an affair.

Fired by community expectations of this special court, the judicial dilemma appears to be balancing an obligation to be "learned and knowledgeable" on one hand and yet not receive particular "ex parte" information in conflict with Canon 3(B)(7)(a). The information obtained from being a judicial leader for better children's services, coupled with that gained by the administrative roles of the typical juvenile court judge, results in additional and special ex parte problems. Conflict exists in the following areas:

- a. Information a juvenile court judge often must receive in any process to resolve the matter before the formal hearing (settlement, emergency custody or restraining orders, informal resolution, pre-trial hearing, detention hearing, child abuse reports, temporary custody.)
- b. Information a judge receives by law and practice, i.e., child abuse reports, prior divorce cases, trials of co-defendants, trials of siblings (see ABA Standards calling for one family, one judge).
- c. Information a judge cannot have avoided knowing in advance of a particular trial or hearing by being a member of the community.
- d. Information a judge should have regarding the efficacy of community resources.

### **Bias Issues**

Inequitable or disproportionate placement or disparate treatment becomes a moral/ethical issue for the judge when the judge or the system for which he or she is responsible bases its behavioral actions on race, gender, culture, disability or economic status, with a resulting disproportionate or disparate outcome.

As stated in the NCJFCJ Commentary to Canon 3(B)(5):

The judge shall seek to eliminate or mitigate all forms of bias and perceptions of bias

within the judicial system, and those institutions or proceedings for which the court is responsible. Such real or perceived bias may include disproportionate access to court process or services, disproportionate incarceration, or any other lack of essential fairness or equal justice based upon the race, gender, disability or economic status of any party or person before the court.

A judge of a juvenile and family court shall have a special mandate and jurisdiction to work towards eliminating or mitigating real or perceived bias within the juvenile and family court system. The responsibility of the judge and court may, in some cases, appropriately extend to other system's agencies handling of delinquency, status offense and abuse/neglect matters, as well as the court's. Judicial concern for essential fairness and equal justice must begin at the pre-adjudicative stage of arrest, detention or removal of the child from the home and continue through the court's continuing jurisdiction for its dispositional orders, regardless of the facility, treatment or service ordered.

The judge and court must control and supervise the process available and conducted for children and families for which the court has ultimate jurisdiction and responsibility. Such responsibilities for essential fairness begin with the development of adequate judicial guidelines and court-approval and review of executive branch process and protocol to assure essential fairness and equal of justice under law. Guidelines should articulate specific conditions and circumstances under which alternative process or formal referral to court will occur and how the procedures will operate to assure fairness with regard to race, gender, disability or economic status. Guidelines should reflect the court's expectations of such agencies, as well as its own staff and court-related process. Periodic review and monitoring of such processes and "court-approved" responsibilities is also a function of the juvenile and family court.

Assurance of resources to eliminate or mitigate "economic" and other types of disproportionate or disparate treatment or services available to minority children, to children of certain gender, or to disabled children can

involve the judge of the juvenile and family court in two ways:

1. Judicial leadership to provide resources for children's best interest, -- off the bench -- within the community.
2. By formal judicial order and disposition of an individual case, where the evidence shows the development and implementation of such resources to be both reasonable and necessary.

### **Who Shapes the Judicial Role?**

Juvenile and family courts must be different things to different people at various stages of the process. Likewise, there are diverse judicial perceptions of roles and the ethical, moral, and social considerations involved in playing out these roles. Professor Moore reminds us that "visible public institutions, particularly those that have legal powers over others, have effects far broader than decisions on individual cases."<sup>8</sup> This observation may be enough to establish the concept that a juvenile or family court should exercise an influence within the community beyond a day-to-day role in adjudicating and disposing individual cases.

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## Judicial Leadership

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*A judge shall perform the duties of judicial office impartially, diligently, and fairly. Canon 3.*

A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interest, public clamor or fear of criticism. Canon 3(B)(2).

A judge shall dispose of all judicial matters promptly, efficiently and fairly. Canon 3(B)(8).

A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations. Canon 4.

*A judge may speak, write, lecture, teach, organize, and participate in other extra-judicial activities concerning the law, the legal system, the provision of services, the administration of justice and non-legal subjects, subject to the requirements of this Code. Canon 4(B).*

### **Judicial Responsibility: Toward Judicial Leadership to Meet the Needs of Children and Families**

Judge Smith, after reading new federal guidelines on the deinstitutionalization of status offenders, meets with the Chairman of the County Board to plead for a speedy decision on the funding of a community facility and treatment program for those who cannot be released back to the custody of their parents.

Judge Black, who also rotates periodically to the civil bench, approaches a local doctor to perform a reconstructive surgical procedure on a female child of 16 presently in foster care but with no insurance coverage. He convinces the surgeon to be available to perform such 'pro-bono' services on a regular basis as needed.

Judge White sends a letter to all local TV and radio stations offering to appear on talk shows or to be interviewed concerning the lack of legislative interest in appropriating additional monies for needed juvenile court probation staff.

Judge Brown writes to 100 local businesses on court stationery asking them to provide summer jobs for shoplifters, so that any restitution he orders may have a chance of being paid.

Judge Pink threatens to hold a state social service director in contempt unless more social workers are made available for children's protective services.

Juvenile and family court judges hold a unique position within the American judiciary. Although their role in society is more debated than understood, it is a fact of their judicial function that their courts have responsibilities for children, for families, for resource provision and administration, and for agency co-ordination far beyond the responsibilities and roles of other courts. Such responsibilities are often defined by statute. More often these roles are broadly mandated by community expectations. However, as one judge commented: "The juvenile code mandates an active role for the judge, then the Ethics Code strips that judge of authority to carry it through." The state of California has recently revised its court rules in an attempt to resolve this conflict.

Of judges responding to the Sample Survey, 92% perceived themselves as operating under special mandates and assume, in addition to routine judicial functions, administrative, leadership and other responsibilities within the community in the interest of children.

One judge notes: "Juvenile courts are special courts with special mandates which exist based on the incapacity of their subject, i.e. children, not adults. Our courts are charged to make positive things occur."

Juvenile courts cannot honestly perform this function without assuring adequate and competent legal representation of both interests -- the traditional defense protection of the child's due process rights at each stage of the proceeding; and, in addition, the same skilled legal advocacy to achieve the best rehabilitative result for the child's interests.

The issue we must resolve is: What is the ethical

or moral duty of the juvenile court judge in assuring the best possible representation of the child consistent with both due process requirements as well as the rehabilitative mission of the juvenile court?

At present, while a judge may wish to take a more active leadership role in this area, the Canons neither require nor permit him to do so.

Making positive things occur relies upon the judge's interrelationship with the community and with the community's service-providing agencies, both public and private. The relationship must necessarily involve interactions with other branches of government.

### Support for Leadership Role

Throughout its publications and policy statements the National Council of Juvenile and Family Court Judges has articulated a leadership role for its member judges. For example, in 1984 within "The Juvenile Court and Serious Offenders: 38 Recommendations" it called on judges "to take the lead in developing community-based treatment for children" and to "act as advocates and catalysts in the development and allocation of resources."<sup>9</sup> As approved by its Board of Trustees and membership, such Council policy urges judges to "actively seek opportunities to explain the goals, plans and problems of the court."<sup>10</sup> Again, as approved by the Council's Board of Trustees and membership, such policy calls upon judges to "develop a close and continuing relationship with schools, law enforcement agencies and business and labor organizations in the community."<sup>11</sup> Among other community-judicial involvement called for are "citizen-court volunteer programs to meet the needs of youth and court-citizen committees to advise the court."<sup>12</sup>

Most recently, in the May, 1989 *Families in Court Recommendations*, it was urged that "individual courts . . . identify and seek alternative sources of funding including support from private foundations for services to families and children."<sup>13</sup>

### Other Jurists Also Concerned

Most recently some prominent jurists have articulated an increasing concern with the permissive rather than mandative language in Canon 4(B) -- "a judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and

non-legal subjects, subject to the requirements of this Code." Former Nebraska Chief Justice Norman Krivosha suggests that Canon 4(B) be revised to mandate a *duty* "to write, lecture, teach and participate in other activities concerning the law." He notes that Canon 4(B), in conjunction with Canon 3 ("A judge shall perform the duties of judicial office impartially and diligently.") and Canon 4 ("A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligation.") do little to delineate the role the judge *should* play." Others suggest addition of more comprehensive commentary as a less drastic revision.

Jeffrey M. Shaman, Director of the Center for Judicial Conduct Organization of the American Judicature Society, states that "Judges are being 'shortchanged' by being too often prohibited from contribution to the free market place of ideas."

### Judicial Perspectives from the Past

Justice Charles D. Breitel noted in a classic article presented at a judicial ethics symposium:

"While it is not desirable for judges to be involved in controversial matters, it is catastrophic if they are not aware of the stresses in their society. . . There must be enough participation in community affairs to make for commitment in the interests and concerns of the community. The danger, of course, is that they may be carried into the storm center. . ."<sup>14</sup>

He goes on to note:

"Always a judge's commitment must carry the restraint born of his sensitive relation to a delicate institution."<sup>15</sup>

Speaking in general of the various elements encountered, he states:

"Each has its importance, in whatever degree because it helps produce the rightness and the true appearance of rightness in the decisions of judges. That is why the intellectual standards and the legal philosophy with which the judge approaches his task are not separable from the ethical and moral standards by which he functions. The over-all goal is the judge who is neutral but not neutralist, impartial but not unconcerned, dispassionate but not uncommitted, disinter-

ested but not indifferent. The ultimate is, as the Greeks have said, the highest good. And what is that here except the judge do right?"<sup>16</sup>

Justice Brietel's words ring with a fair minded and perhaps even liberal interpretation of the Canons. Can the juvenile and family court judge adopt them as a judicious but not dispassionate guideline as to when his or her leadership/education on behalf of children's interests crosses the line into the "storm center" he refers to?

### Judicial Responses from the Present

The responses of the judges surveyed demonstrate a practitioner's insight into areas of potential conflict or tension with regard to judicial leadership on behalf of children vis-a-vis the real or perceived limitations of the Canons. Two-thirds of the judges described such conflict/tension in terms of "community expectations" that their court should serve as a 'cure' or 'clinic', in spite of 'post-Gault' legal/professional obligations." Conversely, a majority of the judges also saw "Lack of time or other limitations" impeding their ability to engage in "activities to improve the law, legal system and the administration of justice (Canon 4[B]). Almost half were concerned with "The legal/professional expectation," that the court "abide by the same formality and due process as available in adult courts." About a third cited Canon 4's requirement on the conducting of the judge's extra-judicial activities as a source of conflict. Another third were concerned that legal/professional expectations inferred that they avoid "perceptions of partiality by *not* speaking out." Nonetheless, in contrast, many cited "community expectations," that they indeed speak out and "do something" on issues involving delinquent/deprived children. More than 20% were concerned that Canon 3(B)(2)'s requirement that a judge "not be swayed by partisan interests," coupled with Canon 3(B)(8)'s requirement that "a judge shall dispose of all judicial matters promptly" made the judge unavailable for a leadership role.

The comments of the judges reiterated some of the above concerns and elaborated on ways that such conflicts might be resolved. While some of the judges thought judicial leadership is handled on an appropriate basis in the Canons, most comments either directly call for revision of the Canons or imply that a problem exists. Prohibitions against "fundraising" were referred to by many judges as an integral part of the leadership conflict.

Following are some thought-provoking comments which provide a further insight into the varied issues:

- "If judge is given juvenile court duties, remove the handcuffs!"
- "Spell out *our* role in Canons."
- "Modify Canons so judges will not be in conflict when addressing youth needs."
- "We should have greater freedom to develop treatment resources."

(For full text, please refer to Appendix C.)

The problem of the tension between the judicial leadership role of the juvenile and family court judge and the Canons of Ethics is a real one. We began this Chapter by looking at some thought-provoking hypotheticals. We ended this Chapter by quoting some real-life comments excerpted from the Sample Survey.

We refer the reader to Chapter Five, which discusses, via proposed NCJFCJ revisions to the ABA Model Code of Judicial Conduct 1990, some potential solutions to the controversial issues posed in this Chapter.



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## Ex Parte Information

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- (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties, concerning a pending or impending proceeding except that:
- (a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
    - (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and
    - (ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.
  - (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.
  - (c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.
  - (d) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so. Canon 3(B)(7)
- issue into several components:
1. Private communication intended to influence the outcome of the litigation, which has always been prohibited by the Canons and should continue to be prohibited.
  2. Information which a judge acquires in the course of a specific case which the judge must have to perform judicial functions, but which cannot be acquired through the adverse process because of constraints of time or circumstances. An example of this type of information is the facts which a judge needs to determine the need for emergency placement of a child. This information could be considered *ex parte* communication under the Canons.
  3. Information about a particular case or family which a judge acquires socially or in the course of hearing other cases, or in the course of participating in activities to further the administration of justice. This type of information has historically been considered *ex parte* communication and the individual judge was expected to disqualify himself or herself if the information created bias or prejudice.
  4. Information provided by concerned persons or expert witnesses in the course of litigation which was expected to be kept confidential from the parties. Such information has historically been disclosed by the court or shared with the parties at the discretion of the judge.
  5. Communications about administrative matters, which has historically been considered allowable under the existing Canons.

### Brief Analysis of the Ex Parte Problem

For effective analysis, it is logical to divide the

In proposing changes in the Canon, we have attempted to draw a distinction between private communications intended to influence the outcome of the case, which should continue to be prohibited, and communications which are necessary to fulfill



the unique requirements of a juvenile or family court case, or are the inevitable result of a well-informed judiciary taking a leadership role. We believe the latter type information should be grounds for disqualification only if the individual judge feels that he or she can no longer give the parties a fair trial.

As noted in Chapter One, the prohibition against ex parte communication is perceived as a problem by juvenile judges. In fact, the issue was most frequently cited by judges in the Sample Survey as their greatest problem.

Sample responses are as follows:

1. "Familiarity developed over time with certain cases."
2. "Certain ex parte information is necessary to fashion a program that will best benefit child."
3. "Vulnerability of judge at social gatherings."
4. "It's 'Catch 22.' Reveal report and preparers won't do decent work-up the next time. Fail to reveal and counsel yells 'due process.'"

The following ideas were suggested as solutions to the problem of receiving ex parte communications:

1. "Recording/divulging all disclosures."
2. "Authorize court to align its own probative value without necessarily requiring recusement or dismissal."
3. "Teach behavioral scientists that they can't tell secrets to judges."
4. "Public/media education."
5. "Need special clarification of, or special permissions for, juvenile court."
6. "Allow judges to be contacted by agencies, shelter homes, etc., about children judge has placed or is responsible for."
7. "Have staff screen all phone calls and correspondence."
8. "Ignore and rely on what comes out in court."
9. "Change the Canons because they are not realistic."
10. "In reference to the special problems of rural judges - greater rural community

tolerance of ex parte."

Canon 3(B)(7) does not preclude a judge with the consent of the parties from conferring separately with the parties and lawyers in an effort to mediate or settle matters pending before the judge.

Certain ex parte communication is approved by Canon 3(B)(7) to facilitate scheduling and emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3(B)(7) are clearly met.

### **Judicial Role in the Community and Ex Parte Concerns**

Although the work of the juvenile/family court involves more human relations and informal communications and process than other courts, the judge is under no less obligation than other judges to adhere to the ex parte communications requirements of Canon 3(B)(7).

In addition, a judge who takes on a leadership role within his jurisdiction may find himself in possession of information which, however valuable, may impact upon a pending or impending adjudication.

A juvenile/family court judge who takes on a leadership role within his community must have a high level of access to information. The judge must be the arbiter of the risks that community leadership brings with regard to such communications.

### **Juvenile/Family Courts and Ex Parte Information**

Juvenile and family courts must often write specific orders designed to protect the child from harm. Very often an abused child or alleged delinquent or status offender will require immediate service or other intervention. In such a case, provision of emergency medical care or therapy cannot wait for a formal hearing and disposition. Likewise, in the case of an abused child where a parent or relative living in the same home is suspected of the abuse, a protective or restraining order is often necessary to immediately remove the suspected adult from the home so that the child may remain safe in the home.

In emergency situations it is often difficult or unacceptable to conduct a formal proceeding with all parties present upon such short notice. Often infor-

mation is received via the phone or from a rushed and hurried social service worker or bureaucracy. It may be the middle of the night. Often no legal representation is available or can be appointed. Such decisions involving the safety or health of children referred to the courts are common. Yet it would appear that many emergency decisions to remove a child or an abusing adult from the home by court order must rely upon a more or less informal procedure involving the use of *ex parte* communication. In order to provide immediate protection for the child, legal formalities and delay must often be discouraged and avoided.

Juvenile and family courts must be authorized by clear statute or rule to issue specific protective or restraining orders under emergency process which permits judicial decision-making to proceed without rigid adherence to the prohibition against the use of *ex parte* communications and information. The judge must be given the discretion to weigh the probative value of such *ex parte* information and to conduct whatever investigation and fact-finding is necessary to meet the emergency at hand and to issue a temporary order pending a formal hearing.

### **Special Rural Ex Parte Concerns**

The role of the juvenile or family court in rural areas or jurisdictions of smaller populations has historically presented special problems with regard to receiving *ex parte* information and communications. A rural judge cannot avoid receiving such communications.

The judge of a jurisdiction with a small population cannot isolate himself socially. Often he or she is, by necessity, even more involved in community affairs, facing even more than the average risk of exposure to *ex parte* situations.

The judge of a rural or smaller jurisdiction must be particularly careful to avoid both the appearance of partiality and the receiving of improper *ex parte* information. More than other judges, the rural juvenile and family court judges must be vigilantly aware of the impact of *ex parte*. However, the judge must be permitted a great deal more authority to mentally bifurcate such information from pending or impending proceedings which he or she cannot avoid adjudicating.



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## Bias Issues

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*A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.*

*A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.*

*A judge has an obligation to actively uphold the principles of essential fairness and equal justice for all in a free society. Canon 3(B)(5), (6).*

### **Bias - An Overview**

A juvenile/family court judge has a positive obligation to seek to eliminate or mitigate all forms of bias and perceptions of bias within the judicial system and those institutions or proceedings for which his or her court is responsible. Such real or perceived bias may include disproportionate access to court process or services, disproportionate incarceration, or any other lack of essential fairness or equal justice based on the race, gender, religion, national origin, age, sexual orientation, disability or economic status of any party or person before the court.

Essential fairness and equal justice begin at the pre-adjudicative stage of arrest, detention or removal of the child from the home and extends through the court's continuing jurisdiction for its dispositional orders, regardless of the facility, treatment or service ordered.

The judge must control and supervise the process available for children and families for which the court has jurisdiction and responsibility. This begins with the development of adequate judicial guidelines to assure essential fairness and equal justice under law. Guidelines should articulate specific conditions and circumstances under which alternative process or formal referral will occur and how procedures will operate to assure fairness for all regardless of race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. Guidelines should reflect the court's expectations of agencies for which it has responsibility, as well as its own staff and court-related process.

Assurance of resources to eliminate or mitigate economic and other types of disproportionate or disparate treatment or services available to minority children, to children of a certain gender, or to disabled children can involve the judge of the juvenile and family court in two ways:

1. By the judge's exercise of judicial leadership to provide resources for children's best interests -- off the bench -- within the community.
2. By formal judicial order and disposition of an individual case, where the evidence shows the development and implementation of such resources to be both reasonable and necessary.

While a judge has an obligation to eliminate or mitigate bias within judicial system functions, he or she also has an obligation not to allow the appearance or perception of bias within judicial system functions.

As the Commentary to the ABA Model Code of Judicial Conduct (1990) states: a judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Judicial bias, as perceived by parties or lawyers in the proceeding, jurors, the media and others, may be manifested by nonverbal communication such as facial expression and body language as

well as by words. A judge must be alert to avoid such prejudicial behavior.

Recent recommendations resulting from a National Symposium sponsored by the American Bar Association, the National Council of Juvenile and Family Court Judges, the National Center for State Courts and the National Judicial College addressed the issue of bias. The following recommendation was made:

Courts must be without bias as to race, gender, ethnicity, handicap, age, or religion, both in fact and in the perception of the community.

- A. Court personnel should be representatives of the composition of the community.
- B. Judges and court personnel should have continuing training to address and to be sensitized regarding bias by reason of gender, race, culture, age, and economics.
- C. Every state should create a state level task force on bias and the courts.
- D. Local bias review committees should be established to audit court practices and review systemic problems.
- E. Codes of judicial conduct should address judicial bias and treat it as a severe transgression. The findings of any judicial disciplinary board, made after notice and opportunity to be heard, should be available to the public.<sup>17</sup>

## **Bias - A More Detailed Look**

### ***Gender Bias***

Nearly a decade ago, gender bias in the courts was a topic that was neither recognized nor considered a legitimate concern for education and reform.

Even after it became a hot topic, comprehensive state-specific information about gender bias in the courts was often difficult to develop. In some states, such data simply did not exist apart from individual cases and anecdotes. Most important, even where data or studies were available, they related to a single issue and did not convey how gender bias is repeatedly manifested across numerous areas of substantive law and in the courtroom.<sup>18</sup>

A current effort working on combatting all aspects of gender bias is the National Judicial Education Program to Promote Equality for Women and

Men in the Courts (NJEP). NJEP is designed to afford judges the opportunity to examine the nature and consequences of gender bias in the law, in decision-making and in courtroom interactions.<sup>19</sup>

Under the auspices of this organization, state-wide task forces in various states have investigated three issues:

1. Do gender-based myths, biases and stereotypes affect the substantive law and/or impact on judicial decision-making?
2. Does gender affect the treatment of women in the judicial system?
3. If so, how can judges affirmatively ensure equal treatment for women and men in the court?<sup>20</sup>

Sensitive examination of these issues within the juvenile system will not only create a heightened awareness of the problem, but will also aid the juvenile/family judge in taking a leadership role to uphold the principles of essential fairness and equal justice for all in a free society.

### ***Disability Bias***

Estimates of learning disabilities among delinquents, based both upon direct examination of the records of samples of delinquents and large-scale official estimates of handicaps among delinquents, range from nearly 30 percent to more than 60 percent.<sup>21</sup>

For those delinquents in confinement, correctional administrators have been attempting to meet special educational needs through the development of policies and programs that meet the standards set by P.L. 94-142, the Education for All Handicapped Children Act of 1975. This law requires states to identify, evaluate, and, if necessary, provide appropriate special education and related services to all individuals identified as handicapped up to age 21.<sup>22</sup>

The problem is that this law was written primarily for the public school system, and it is difficult to translate into other insitutional settings. The unique characteristics of correctional facilities makes compliance especially difficult.

A concerned judge can attack this special bias issue in two ways:

1. By exercising his off-the-bench judicial leadership role within the community to provide resources for learning.

2. By compelling such resources through the use of judicial order and disposition of an individual case.

### *Economic Bias*

The lack of resources for children -- both public and private, both within and without the court service system structure is a major and perhaps growing concern of the juvenile and family court judges charged with responsibilities for children and families.

Although judicial persuasion is more effective than judicial concern, the court must use its authority to take the steps necessary to bring about a public understanding of the court's needs. In the final analysis, the court must be able to compel the establishment of resources. In order to compel the development of such resources, the court must exercise a wider authority and responsibility than it has been willing to in the past.

We suggest that statutory authority is ultimately more efficacious to the court than testing the waters of inherent judicial power. Resource-short service providers, or less sensitive appellate courts, often reject the most passionate inherent powers arguments of a juvenile court. In states where courts are granted explicit authority by statute to designate a specific institution or service, the cost and delay of appellate review is often avoided as acceptance of the court's authority takes effect. Statutory language should reflect a clear understanding that the juvenile or family court is the ultimate arbiter of what is in the best interests of the child as well as taking into account that children have no vote and thus no voice.

Consistent with our recommendation, we believe that judges have the obligation to be aware of the problem of disproportionality within their community and strive to take a leadership role in potential solutions. At the same time, the Consortium recognizes the need for greater judicial leadership for juvenile court judges than the present Canons allow.

### Notes

- <sup>1</sup>Webster's New Universal Unabridged Dictionary, Second Edition, p. 627.
- <sup>2</sup>Webster's New Universal Unabridged Dictionary, Second Edition, p. 627.
- <sup>3</sup>From *Children to Citizens*, Mark H. Moore, Springer-Verlag New York, Inc., 1987.
- <sup>4</sup>*In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967).
- <sup>5</sup>From *Children to Citizens*, Mark H. Moore, Springer-Verlag New York, Inc., 1987.
- <sup>6</sup>*Ibid.*
- <sup>7</sup>*Ibid.*
- <sup>8</sup>*Ibid.*

<sup>9</sup>*The Juvenile Court and Serious Offenders: 38 Recommendations Juvenile and Family Court Journal Special Issue--Summer 1984*, The National Council of Juvenile and Family Court Judges, p. 20.

<sup>10</sup>*Ibid.*, p. 20.

<sup>11</sup>*Ibid.*, p. 20.

<sup>12</sup>*Ibid.*, p. 20.

<sup>13</sup>*Families in Court Recommendations from a National Symposium*, National Council of Juvenile and Family Court Judges, May 1989, p. 7.

<sup>14</sup>*Judicial Ethics: A Symposium*. "Ethical Problems in the Performance of the Judicial Function," C.D. Breitel, Volume 19, Number 1, October, 1964, University of Chicago Law School Conference Series.

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*

<sup>17</sup>*Families in Court Recommendations from a National Symposium*, NCJFCJ, May 1989, p. 12.

<sup>18</sup>"Documenting Gender Bias in the Courts: The Task Force Approach," *Judicature*, February-March 1987, Volume 70, No. 5, Lynn Hecht Schafran, 281.

<sup>19</sup>*Ibid.* See also: Schafran, "Educating the Judiciary About Gender Bias," *9 Women's Rights, L. Rep.*, 109 (1986). Schafran, "Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges," *24 Judges J.* 12 (Winter 1985).

<sup>20</sup>*Ibid.*

<sup>21</sup>"Effective Special Education for Juveniles," *Corrections Today*, June 1987, volume 49, No. 3, Gail M. Schwartz and Kathleen A. Lewis.

<sup>22</sup>*Ibid.* See also, Murphy, D.M. 1986. "Prevalence and Types of Handicapping Conditions Found in Juvenile Correctional Institutions: A National Survey," *Remedial and Special Education* 7: 7-17.



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## NCJFCJ Amendments and Commentary to the ABA Model Code of Judicial Conduct (1990)

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*"The more we advocate for an informed judiciary, the more likely that judges either accumulate information regarding social problems beyond the Canon of ethics of a dispassionate trier of fact or they begin to develop a therapeutic or behavioral bias in the handling and presentation of an individual cases," notes Judge FitzGerald, a Consortium member.*

These and other comments on the judicial leadership role lead the Consortium to recommend the promulgation of the following as Council recommendations for changes in the ABA Model Code of Judicial Conduct (1990), or in the existing respective state codes of judicial conduct. The ABA Model Code of Judicial Conduct (1990) is utilized for suggested revision purposes.

The document that appears in this Chapter is the draft version of the ABA Model Code of Judicial Conduct (1990) with NCJFCJ Amendments appearing as both italicized and underlined.

### **Model Code of Judicial Conduct (1990)**

#### ***Preamble***

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and

Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific prescriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the serious-



ness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

### Terminology

Terms explained below are noted with an asterisk (\*) in the Sections where they appear. In addition, the Sections where terms appear are referred to after the explanation of each term below.

“Appropriate authority” denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Sections 3D(1) and 3D(2).

“Candidate.” A candidate is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The term “candidate” has the same meaning when applied to a judge seeking election to non-judicial office. See Sections 5A, 5B, 5C and 5E.

“Continuing part-time judge.” A continuing part-time judge is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment, including a retired judge subject to recall who is permitted to practice law. See Application Section C.

“Court personnel” does not include the lawyers in a proceeding before a judge. See Sections 3B(7)(c) and 3B(9).

“De minimis” denotes an insignificant interest that could not raise reasonable question as to a judge’s impartiality. See Sections 3E(1)(c) and 3E(1)(d).

“Economic interest” denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

- i. ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or the outcome of the proceeding could substantially affect the value of the interest;
- ii. service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge’s spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;
- iii. a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless the outcome of the proceeding could substantially affect the value of the interest;
- iv. ownership of government securities is not an economic interest in the issuer unless the outcome of the proceeding could substantially affect the value of the securities.

See Sections 3E(1)(c) and 3E(2).

“Fiduciary” includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(2) and 4E.

“Knowingly,” “knowledge,” “known” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances. See Sections 3D, 3E(1), 4D(5) and 5A(3).

“Law” denotes court rules as well as statutes, constitutional provisions and decisional law. See Sections 2A, 3A, 3B(2), 3B(6), 4B, 4C, 4D(5), 4F, 4I, 5A(2), 5A(3), 5B(2), 5C(1), 5C(3) and 5D.

“Member of the candidate’s family” denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship. See Section 5A(3)(a).

“Member of the judge’s family” denotes a

spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Sections 4D(3), 4E and 4G.

“Member of the judge’s family residing in the judge’s household” denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household. See Section 4D(5).

“Nonpublic information” denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports. See Section 3B(11).

“Periodic part-time judge.” A periodic part-time judge is a judge who serves or expects to serve repeatedly on a part-time basis but under a separate appointment for each limited period of service or for each matter. See Application Section D.

“Political organization” denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Sections 5A(1) and 5B(2).

“Pro tempore part-time judge.” A pro tempore part-time judge is a judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard. See Application Section E.

“Public election.” This term includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections. See Section 5C.

“Require.” The rules prescribing that a judge “require” certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term “require” in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge’s direction and control. See Sections 3B(3), 3B(4), 3B(5), 3B(6), 3B(9) and 3C(2).

“Third degree of relationship.” The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild,

great-grandchild, nephew or niece. See Section 3E(1)(d).

## CANON 1:

### A Judge Shall Uphold the Integrity and Independence of the Judiciary

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should *actively* participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

#### ABA Commentary:

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

#### NCJFCJ Commentary:

The adverb “actively” was added to explicitly encourage an element of leadership within judicial conduct matters. Its use here is intended to introduce a broader concept of judicial leadership in the interests of society within the following Canons, as well as the need for all judges to be actively involved in shaping and applying the Canons to their respective roles.

Juvenile and family court jurisdictions number over 3,000 and require more than 7,000 judges and referees and 100,000 administrative service and support personnel. Each year they order 1.3 million delinquency dispositions, hear 390,000 child abuse or neglect cases, review an estimated 600,000 continuing protective service orders, preside over 1.3 million divorce and legal separations and determine the custody of 2.6 million children. In addition, they hear countless cases involving paternity, child support, adoption, family violence, civil commitment, and various child emancipation issues. Courts with juvenile and family jurisdiction have enormous

responsibilities to those they serve. Their functions are varied, complex and understood differently by scholars, policy-makers, and practitioners.

Juvenile and family court judges must be aware of a large variety of options for rehabilitating children and their parents and when each is effective.

Juvenile and family court judges hold a unique position within the judiciary. Their judicial function includes responsibilities for children, for families, for resource provision and administration, and for coordination with other agencies far beyond the responsibilities and roles of other trial courts. Such responsibilities are often defined by statute. Particularly because of these varying and expanded functions within the respective juvenile and family court jurisdictions and systems, the judge of a juvenile or family court must actively participate in the mandate of Canon 1.

## CANON 2:

### A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall respect and comply with the law\* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

#### ABA Commentary:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is

whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

See also Commentary under Section 2C.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment ~~impair the judge's objectivity~~. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

See Terminology, "law."

#### ABA Commentary:

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may provide a letter of recommendation based on the judge's personal knowledge. A judge also may permit the use of the judge's name as a reference, and respond to a request for a personal recommendation when solicited by a selection authority such as a prospective employer, judicial selection committee or law school admissions office. A judge also may provide information in response to a request from a sentencing judge or a probation or corrections officer.

Judges may participate in the process of judicial selection by cooperating with appointing

authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

#### ABA Commentary:

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See *New York State Club Ass'n, Inc. v. City of New York*, 108 S.Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. 1940 (1987), 95 L. Ed. 2d 474; *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, other public manifestation of a judge's knowing approval of invidious discrimination

constitutes the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A. For example, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. A judge's membership in an organization that engages in any discriminatory membership practices violative of the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety.

D. A judge may properly lend the prestige of the judge's office to advance the public interest in the administration of justice.

E. A judge may actively support public agencies or interests or testify voluntarily on public matters concerning the law, the legal system, the provision of services, and the administration of justice.

#### NCJFCJ Commentary

**Canon 2(B)** The ABA language "influence the judge's judicial conduct or judgment" was replaced by "impair the judge's objectivity." While family, social, political, or other relationships always influence a judge's conduct, this influence can be negative or positive. It was felt that the new language better reflected this fact.

**Canon 2(D)** Lending the prestige of the judicial office to advance the public interest in the administration of justice in a free society may be done appropriately without the appearance of impropriety.

**Canon 2(E)** The public has an interest in hearing the ideas of its judiciary within the public forum on matters concerning the administration of justice. Within the limits on judicial conduct set forth within these Canons, a judge may exercise the constitutional right of free speech, and association on such matters. The phrase "provision of services" means the services necessary to properly fulfill the court's legal responsibilities. The need for such services and a judge's ability to actively support their provision by public agencies is particularly acute within most juvenile and family court jurisdictions.

One of the roles imposed upon the juvenile and family court by statute, rule, custom or community expectations is the obligation on the part of its judiciary to assume a leadership role on behalf of the interests of delinquent, deprived or

abused children and the families of such children within the community. The leadership role must necessarily include activism on behalf of such children and families and must extend beyond the narrow perimeter of the judge's more familiar adjudicative role as a finder of fact or as a decision maker with regard to individual dispositions.

The mandate of the juvenile and family court to protect the best interests of children must allow for a more active and broader role for the judge within the community than the traditional individual case-by-case adjudicative and dispositional role of the court. The judge (or judges) of such a court must be permitted to protect, according to law, the best interests of the children and families who must or may appear before it.

Judicial leadership, in the interests of children and families, should and must not abrogate nor interfere with the judicial obligation to promote public confidence in the integrity and impartiality of the judiciary. It should continue to be made clear by statute, code or rule that the judge's actions while performing the judicial functions of adjudication and disposition of an individual case be, and be perceived as, strictly and totally impartial. Testimony for children's interests and resources in general and a child's "best interests" within an adjudication proceeding requiring judicial impartiality until the evidence is submitted and findings of fact made must be distinguished and distinguishable.

### CANON 3:

#### A Judge Shall Perform the Duties of Judicial Office Impartially, and Diligently, and Fairly.

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law\* or rule of court. In the performance of these duties, the following standards apply.

##### B. Adjudicative Responsibilities.

1. A judge shall hear and decide matters assigned to the judge except those in which the judge is in fact disqualified.
2. A judge shall be faithful to the law\* and maintain professional competence in it. A

judge shall not be swayed by partisan interests, public clamor or fear of criticism.

3. A judge shall require\* order and decorum in proceedings before the judge.
4. A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require\* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

#### ABA Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

See Terminology, "law."

See Terminology, "require."

5. A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. A judge has an obligation to actively uphold the principles of essential fairness and equal justice for all in a free society.

#### ABA Commentary:

A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Judicial bias, as perceived by parties or lawyers in the proceeding, jurors, the media and others, may be manifested by nonverbal communication such as facial expression and body language as well as by words. A judge must be alert to avoid such prejudicial behavior.

6. A judge shall require\* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against

parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

7. A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law\*. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

See Terminology, "require."

See Terminology, "law."

- a. Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
  - i. the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
  - ii. the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
- b. A judge may obtain the advice of a disinterested expert on the law\* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
- c. A judge may consult with other judges or with court personnel\* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

- d. A judge may initiate or consider any ex parte communications when expressly authorized by law\* to do so.

#### ABA Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge with the consent of the parties from conferring separately with the parties and lawyers in an effort to mediate or settle matters pending before the judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

See Terminology, "law."

See Terminology, "court personnel."

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications received regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication must be provided to all parties.

8. A judge shall dispose of all judicial matters promptly, efficiently and fairly.

**ABA Commentary:**

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

9. A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require\* similar abstention on the part of court personnel\* subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

**ABA Commentary:**

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. The conduct of lawyers relating to trial publicity is governed by [Rule 3.6 of the ABA Model Rules of Professional Conduct]. (Each jurisdiction should substitute an appropriate reference to its rule.)

10. A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

**ABA Commentary:**

Commending or criticizing jurors for their verdict may imply a judicial expectation in future

cases and may impair a juror's ability to be fair and impartial in a subsequent case.

See Terminology, "require."

See Terminology, "court personnel."

11. A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information\* acquired in a judicial capacity.

12. A judge should be sensitive to the special needs of persons who must appear in court. Persons with special needs include children, victims of crimes, minorities, and those persons with physical or developmental disabilities or illness.

**C. Administrative Responsibilities.**

1. A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

2. A judge shall require\* staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

3. A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

4. A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

5. A judge should seek the necessary time, staff, expertise and resources to discharge all judicial and administrative responsibilities.

6. A judge should require that court-appointed attorneys practicing before the court demonstrate sufficient expertise within their specialty.

**ABA Commentary:**

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

See Terminology, "nonpublic information."

See Terminology, "require."

**D. Disciplinary Responsibilities.**

1. A judge having knowledge\* that another judge has committed a violation of this Code should take appropriate action. If the violation raises a substantial question as to the other judge's fitness for office, the judge shall inform the appropriate authority\*.
2. A judge having knowledge\* that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. If the violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, the judge shall inform the appropriate authority\*.
3. Acts of a judge in the discharge of disciplinary responsibilities imposed by this Section 3D are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

**ABA Commentary:**

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

**E. Disqualification.**

1. A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

See Terminology, "knowledge."

See Terminology, "appropriate authority."

**ABA Commentary:**

Under this rule, a judge is disqualified when-

ever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

- a. the judge has a personal bias or prejudice concerning a party, or personal knowledge\* of disputed evidentiary facts concerning the proceeding beyond official communications received in the course of performing a judicial responsibility and general knowledge of resources acquired by training programs or from experience.
- b. the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

**ABA Commentary:**

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.



See Terminology, "knowingly," knowledge," "known" and "knows."

- c. the judge knows\* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child has an economic interest\* in the subject matter in controversy or in a party to the proceeding or any other more than de minimis\* interest that could be substantially affected by the outcome of the proceeding;
- d. the judge or the judge's spouse, or a person within the third degree of relationship\* to either of them, or the spouse of such a person:
  - i. is a party to the proceeding, or an officer, director or trustee of a party;
  - ii. is acting as a lawyer in the proceeding;
  - iii. is known\* by the judge to have a more than de minimis\* interest that could be substantially affected by the outcome of the proceeding;
  - iv. is to the judge's knowledge\* likely to be a material witness in the proceeding.

**ABA Commentary:**

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

- 2. A judge shall keep informed about the judge's personal and fiduciary\* economic interests\*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

See Terminology, "knowingly," knowledge," "known" and "knows." See Terminology, "economic interest."

See Terminology, "de minimis."

See Terminology, "third degree of relationship."

See Terminology, "fiduciary."

**F. Remittal of Disqualification.**

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

**ABA Commentary:**

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

**NCJFCJ Commentary:**

The duty to hear all proceedings fairly and with patience and sensitivity to special needs is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like while being patient, deliberate, and sensitive. Judicial duties include those prescribed by rule of court.

**Canon 3(A)** Add "Rule of court." A rule of court need not have the same status as case law or a statute to qualify under this Canon. However, it must be a matter of public record- i.e., either filed with the court or posted on a bulletin board - according to each state's laws.

**Canon 3(B)(5)** A juvenile/family court judge has a positive obligation to actively seek to eliminate or mitigate all forms of bias and perceptions of bias within the judicial system and those institutions or proceedings for which his or her court is responsible. Such real or perceived bias may include disproportionate access to court process or services, disproportionate incarceration, or any other lack of essential fairness or

equal justice based on the race, gender, religion, national origin, age, sexual orientation, disability or economic status of any party or person before the court.

Essential fairness and equal justice begin at the pre-adjudicative stage of arrest, detention or removal of the child from the home and extends through the court's continuing jurisdiction for its dispositional orders, regardless of the facility, treatment or service ordered.

The judge must control and supervise the process available for children and families for which the court has jurisdiction and responsibility. This begins with the development of adequate judicial guidelines to assure essential fairness and equal justice under law. Guidelines should articulate specific conditions and circumstances under which alternative process or formal referral will occur and how procedures will operate to assure fairness for all regardless of race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. Guidelines should reflect the court's expectations of agencies for which it has responsibility, as well as its own staff and court-related process.

Assurance of resources to eliminate or mitigate economic and other types of disproportionate or disparate treatment or services available to minority children, to children of a certain gender, or to disabled children can involve the judge of the juvenile and family court in two ways:

- 1) By the judge's exercise of judicial leadership to provide resources for children's best interests--off the bench--within the community.
- 2) By formal judicial order and disposition of an individual case, where the evidence shows the development and implementation of such resources to be both reasonable and necessary.

**Canon 3(B)(12)** This subsection was added to highlight the increasingly sensitive role that courts, along with all aspects of our society, are accepting with regard to children, victims of crimes, minorities and those persons with physical or developmental disabilities or illness.

**Canon 3(C)(4)** Appointment on the basis of merit requires that an appointee have the prerequisite skills and knowledge to competently perform an assigned task. Our revision of Canon 3(C)(4) casts the requirement in a positive way.

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, experts, guardians-ad-litem, mediators, child custody evaluators, probation officers, voluntary or pro bono appointees such as Court Appointed Special advocates (CASA's), and voluntary probation workers, in addition to court

personnel.

Conduct by the parties to an appointment or award of compensation does not relieve the judge of the obligation prescribed by this section.

**Canon 3(C)(5)** This new sub-section sets forth the express need for time, staff expertise, and resources to perform the necessary administrative functions. It gives juvenile and family court judges a defense if the budget is not adequate to perform judicial functions.

Appropriate support must be permitted and provided for the presiding or administration judge to fulfill administrative responsibilities. Such duties require that the administrative or presiding judge of a court be granted the appropriate time, staff and other resources, and have obtained the necessary administrative expertise to perform the tasks necessary to effective administration of justice. The administrative function must be considered a judicial duty of equal or higher precedent with existing adjudicative duties with regard to disposing promptly of the business of the court.

**New Canon 3(C)(6)** This new sub-section expands the role of the judge to require competent counsel appointed for indigents as an administrative duty. The Canon is permissive. It should be a goal. In the case of appointed counsel, the judge should assure sufficient expertise in the required specialty before appointment.

The presiding juvenile and family court judge--whether elected, appointed or rotated to this position--must be so selected on the basis of commitment and interest in, and expertise and knowledge of, children's issues. Such selection also must be based upon demonstrated administrative abilities and the judge's ability to work within the community as a representative of the judiciary. The selection should be for a substantial number of years to allow the judge to develop further expertise and influence within the community in the interests of children.

A presiding or administrative judge must be permitted the necessary and adequate amount of time and staff necessary to perform his respective presiding or administrative role. In large jurisdictions such a position, encompassing as it should, complex administrative duties as well as representation of the court's interests and children's issues within the community, should be a full-time position which does not involve adjudication or disposition of cases.

In the performance of the judicial function, a judge often finds it necessary or unavoidable to

obtain a knowledge of disputed evidentiary facts prior to a proceeding. Judicial approval of bail bonds and emergency removal of abused children from their homes are but two examples. The prohibition against bias or personal knowledge obtained within the performance of a judicial function. Such previously obtained official knowledge requires the judge to set aside such knowledge in an adjudication of facts and disqualify himself if such knowledge cannot be set aside. All such officially obtained knowledge must be made part of the court's file. Canon 3 (E) (1) (a) is particularly addressed to rural areas.

#### **CANON 4:**

### **A Judge Shall So Conduct the Judge's Extra-Judicial activities as to Minimize the Risk of Conflict with Judicial Obligations**

A. Extra-judicial activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge;
2. demean the judicial office; or
3. interfere with the proper performance of judicial duties.

#### **ABA Commentary:**

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, cast reasonable doubt on the judge's capacity to act impartially as a judge. See Section 2C and accompanying Commentary.

B. Avocational activities. A judge may speak, write, lecture, teach, organize, and participate in other extra-judicial activities concerning the law\*, the legal system, the provision of services, the administration of justice and non-legal subjects, subject to the requirements of this Code.

See Terminology, "law."

#### **ABA Commentary:**

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice,

including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law.

In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

C. Governmental, Civic or Charitable activities.

1. A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law\*, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

#### **ABA Commentary:**

See Section 2B regarding the obligation to avoid improper influence.

2. A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law\*, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

See Terminology, "law."

#### **ABA Commentary:**

Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Section 4C(3). The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges

should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Section 4C(2) does not govern a judge's service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Section 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Section 4C(3).

3. A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to or assisting in the improvement of the law, the legal system, the provision of services, or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

#### ABA Commentary:

Section 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2).

See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Sections 2C or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Section 4C. For example, a judge is prohibited by Section 4G from serving as a legal advisor to a civic or charitable organization.

a. A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be

engaged frequently in adversary proceedings in any court.

#### ABA Commentary:

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

- b. A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:
- i. may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;
  - ii. may make recommendations to public and private fund-granting organizations on projects and programs concerning the law\*, the legal system or the administration of justice;
  - iii. shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;
  - iv. shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.
4. A judge may publicly or individually endorse project goals concerning the law, the legal system, the provision of services or

the administration of justice, in principle, and actively support the need for funding of such an organization or governmental agency.

**ABA Commentary:**

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: 1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority, 2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves and 3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

A judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code.

**D. Financial activities.**

1. A judge shall not engage in financial and business dealings that:
  - a. may reasonably be perceived to exploit the judge's judicial position, or
  - b. involve the judge in frequent trans-

actions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

**ABA Commentary:**

The Time for Compliance provision of this Code (Application, Section F) postpones the time for compliance with certain provisions of this Section in some cases.

When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position or involve those family members in frequent transactions or continuing business relationships with persons likely to come before the judge. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary for Section 4B regarding use of the phrase "subject to the requirements of this Code."

2. A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family\*, including real estate, and engage in other remunerative activity.

**ABA Commentary:**

Subject to the requirements of this Code, a judge may hold and manage investments of the judge or members of the judge's family or of the

judge and members of the judge's family.

3. A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

See Terminology, "member[s] of the judge's family."

- a. a business closely held by the judge or members of the judge's family\*, or
- b. a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

**ABA Commentary:**

Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.

4. A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.
5. A judge shall not accept or knowingly\* permit a member of the judge's family residing in the judge's household\* to accept a gift, bequest, favor or loan from anyone except for:

See Terminology, "member[s] of the judge's family."

See Terminology, "knowingly."

See Terminology, "member of the judge's family residing in the judge's household."

**ABA Commentary:**

Section 4D(5) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 5.

Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

- a. a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law\*, the legal system or the administration of justice;

**ABA Commentary:**

Acceptance of an invitation to a law-related function is governed by Section 4D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(5)(h).

A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 4A(1) and 2B.

See Terminology, "law."

- b. a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

- c. ordinary social hospitality;
- d. a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

**ABA Commentary:**

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(5)(e).

- e. a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;
- f. a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;
- g. a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or
- h. any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H.

**ABA Commentary:**

Section 4D(5)(h) prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

**E. Fiduciary activities.**

- 1. A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary\*, except for the estate, trust or person of a member of the judge's family\*, and then only if such service will

not interfere with the proper performance of judicial duties.

- 2. A judge shall not serve if it is likely that the judge as a fiduciary\* will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
- 3. The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary\* capacity.

**ABA Commentary:**

The Time for Compliance provision of this Code (Application, Section F) postpones the time for compliance with certain provisions of this Section in some cases.

The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 4D(4).

See Terminology, "fiduciary."

See Terminology, "member of the judge's family."

**F. Service as Arbitrator or Mediator.** A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law\*.

**ABA Commentary:**

Section 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

**G. Practice of Law.** A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family\*.

**ABA Commentary:**

This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other

governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2(B).

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

See Terminology, "law."

See Terminology, "member of the judge's family."

Canon 6, new in the 1972 Code, reflected concerns about conflicts of interest and appearances of impropriety arising from compensation for off-the-bench activities. Since 1972, however, reporting requirements that are much more comprehensive with respect to what must be reported and with whom reports must be filed have been adopted by many jurisdictions. The Committee believes that although reports of compensation for extra-judicial activities should be required, reporting requirements preferably should be developed to suit the respective jurisdictions, not simply adopted as set forth in a national model code of judicial conduct. Because of the Committee's concern that deletion of this Canon might lead to the misconception that reporting compensation for extra-judicial activities is no longer important, the substance of Canon 6 is carried forward as Section 4H in this Code for adoption in those jurisdictions that do not have other reporting requirements. In jurisdictions that have separately established reporting requirements, Section 4H(2) (Public Reporting) may be deleted and the caption for Section 4H modified appropriately.

#### H. Compensation, Reimbursement and Reporting.

1. Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety. (Throughout this section, "extra-judicial" means in addition to judicial activities; and "non-judicial" means not related to judicial activities--e.g., Boy Scouts.)

- a. Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.
- b. Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

See Terminology, "law."

2. Public Reports. A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law\*.

#### ABA Commentary:

See Section 4D(5) regarding reporting of gifts, bequests and loans.

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law\*.

#### ABA Commentary:

Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See "economic



interest" as defined in the Terminology Section. Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties; Section 4H requires a judge to report all compensation the judge received for activities outside judicial office. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.

See Terminology, "law."

#### **NCJFCJ COMMENTARY:**

**Canon (4)(B)** As a judicial officer and a person learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, the provision of services, and the administration of justice. This contribution can include the revision of substantive and procedural law; improvement of the criminal and juvenile justice system; and the provision of services necessary to properly fulfill or augment the court's legally-mandated responsibilities. It is the intent of Canon 4(B) to encourage judicial involvement in the increasing utilization of public-private partnerships to accomplish the objectives and responsibilities of the court. Within the provisions of Canon 4, judicial support and endorsement of the goals of such public or private services as drug treatment, DUI services, mediation services and counseling programs would be permitted.

Though it is not a judicial duty, Canon 4 encourages the proactive involvement of the judge in participating in the development of appropriate resources and services for the courts as a "judicially-related" activity. This participation can either be independent, through a bar association, judicial conference or other organization dedicated to or assisting in the improvement of the law.

Judicial leadership within the community or participation in fund-raising or fund-granting activities in the interest of the improvement of the law, the legal system, the provision of services and the administration of justice should not be, or be perceived as, an act swayed by partisan interests as referred to in Canon 3. The word "organize" is added to emphasize another type of permissible judicially related activity. "Provisions of services" is also added.

The judge shall have a role in supporting community resources to provide more services for children--such as CASA, foster care, drug treatment programs. The judge has a role as a community leader to help support these projects.

These leadership activities shall not detract from the impartiality of that judge and the use of these resources.

The addition of "the provision of services" here and throughout the Canons' litany of causes worthy of judicially-related activity is meant to reflect the concerns of many with regard to enabling a judge to take a leadership role in obtaining the services and resources necessary to properly fulfill or augment a court's legally-mandated responsibilities. By adding "provision of services" here and elsewhere in the Canons the judge of such courts requiring such services is assured that judicial leadership on their behalf is according to the provisions of Canon 4 as revised. Examples of the need for a judge to take a leadership role in obtaining resources and services for judicially related activities, include leadership to obtain workable DUI programs to which the court may refer offenders, and most particularly, the unique role of the juvenile or family court judge in obtaining resources and services for children and families within the court's jurisdiction.

**Canon (4)(C)(4)(New)** This sentence is revised to clarify that a judge may assist such an organization or agency in the above manner, and participate in management and investment, but not personally solicit funds for such programs.

The National Council of Juvenile and Family Court Judges has articulated a leadership role for its member judges. For example, in 1984, within "The Juvenile Court and Serious Offenders: 38 Recommendations" it called on judges "to take the lead in developing community-based treatment for children: and to "act as advocates and catalysts in the development and allocation of resources." As approved by its Board of Trustees and membership, such Council policy urges judges to "actively seek opportunities to explain the goals, plans, and problems of the court." Again, as approved by the Council's Board of Trustees and memberships, such policy calls upon judges to "develop a close and continuing relationship with schools, law enforcement agencies, and business and labor organizations in the community." Among other community-judicial involvement called for are "citizen-court volunteer programs to meet the needs of youth and court-citizen committees to advise the court."

Council policy states that "judges can and should be instrumental in insuring adequate staff development regardless of whether staff report directly to the court or to an administrative agency." It calls for juvenile courts to act to "strengthen the probation function" and to "secure additional funds to better accomplish its goals and assure that existing funds are being

most effectively utilized.”

More recent Council policy (*Deprived Children: A Judicial Response, 73 Recommendations, 1986*) states:

“Judges must provide leadership within the community in determining needs and obtaining and developing resources and services for deprived children and families. The judicial responsibility for impartiality does not preclude a judge from providing leadership within the community.”

Likewise the Council’s (1988) policy on *Drugs - The American Family Crisis: A Judicial Response, 39 Recommendations* detailed a strong role for the judge. It states:

“Judges must assert community leadership for prevention and treatment of substance abuse among juveniles and their families.”

Types of activities Permissible:

The ability of a judge under revised Canon 4 to be active in the interests of children should include but not necessarily be limited to such activities as:

(a) representation of the juvenile or family court on Citizen’s Committees, Advisory Groups, Agency or Intergovernmental Coordination Committees, etc. in the interests of children or families;

(b) testimony or public advocacy or consultation on children’s issues for the consideration of legislative or other public bodies or officials;

(c) endorsement, support and leadership with regard to obtaining or re-allocating resources for children’s facilities and programs, including programs which impact upon the court’s responsibilities by preventing child abuse, drug abuse, family dysfunction, delinquency, truancy, etc.;

(d) public speaking or lecturing and solicitation of media coverage on behalf of children’s issues and including such subjects as drugs, AIDS, education, the function of the court, etc.;

(e) participation in organization of community resources, including both the public and private sectors, on behalf of children’s interests;

(f) advocacy for the court’s interpretation of ‘best interests’ of a child with executive branch agencies and with regard to specific programs or resources required to be provided, either subsequent to or within an individual disposition or order, or by general rules, or by written or spoken communications if pertaining to the agency in general and not violative of a prohibition against private communications in Canon 3; and

(g) any lawful use of the judge’s individual or

professional expertise or authority in the development, improvement or administration of services or resources in the interests of children or families.

## CANON 5:

### A Judge or Judicial Candidate Shall Refrain from Inappropriate Political activity

**Introductory Note to Canon 5:** There is wide variation in the methods of judicial selection used, both among jurisdictions and within the jurisdictions themselves. In a given state, judges may be selected by one method initially, retained by a different method, and selected by still another method to fill interim vacancies.

According to figures compiled in 1987 by the National Center for State Courts, 32 states and the District of Columbia use a merit selection method (in which an executive such as a governor appoints a judge from a group of nominees selected by a judicial nominating commission) to select judges in the state either initially or to fill an interim vacancy. Of those 33 jurisdictions, a merit selection method is used in 18 jurisdictions to choose judges of courts of last resort, in 13 jurisdictions to choose judges of intermediate appellate courts, in 12 jurisdictions to choose judges of general jurisdiction courts and in 5 jurisdictions to choose judges of limited jurisdiction courts.

Methods of judicial selection other than merit selection include nonpartisan election (10 states use it for initial selection at all court levels, another 10 states use it for initial selection for at least one court level) and partisan election (8 states use it for initial selection at all court levels, another 7 states use it for initial selection for at least one level). In a small minority of the states, judicial selection methods include executive or legislative appointment (without nomination of a group of potential appointees by a judicial nominating commission) and court selection. In addition, the federal judicial system utilizes an executive appointment method. See *State Court Organization 1987* (National Center for State Courts 1988).

#### A. All Judges and Candidates

1. Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate\* for election or appointment to judicial office shall not:

- a. act as a leader or hold an office in a political organization\*;
- b. publicly endorse or publicly oppose another candidate for public office;
- c. make speeches on behalf of a political organization;
- d. attend political gatherings; or
- e. solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

**ABA Commentary:**

This paragraph was added to make clear that a judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization."

Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

A candidate does not publicly endorse another candidate for public office by having that candidate's name on the same ticket.

See Terminology, "candidate."

See Terminology, "political organization."

2. A judge shall resign from judicial office upon becoming a candidate\* for a non-judicial office either in a primary or in a general election except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law\* to do so.
3. A candidate\*, including an incumbent judge who is a candidate, for a judicial office:

- a. shall maintain the dignity appropriate to judicial office, and shall encourage members of the candidate's family\* to adhere to the same standards of political conduct in support of the candidate that apply to the candidate;

**ABA Commentary:**

Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

- b. shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;
- c. except to the extent permitted by Section 5C(2), shall not authorize or knowingly\* permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

See Terminology, "candidate."

See Terminology, "law."

See Terminology, "member of the candidate's family."

See Terminology, "knowingly."

- d. shall not:
  - i. make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
  - ii. make statements that commit or appear to commit the candidate with respect to cases or controversies that are likely to come before the court; or
  - iii. knowingly misrepresent the identity, qualifications, present position or other fact concerning the candi-

date or an opponent;

**ABA Commentary:**

Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases or controversies likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. This Section does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the ABA Model Rules of Professional Conduct.

- e. may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

**B. Candidates Seeking Appointive Judicial Office.**

- 1. A candidate for appointment to judicial office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

See Terminology, "knowingly."

See Terminology, "candidate."

- 2. Unless otherwise prohibited by law\*, a non-judge candidate\* for appointment to judicial office may:
  - a. retain an office in a political organization\*,
  - b. attend political gatherings, and
  - c. continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.

**ABA Commentary:**

Section 5B(2) provides a limited exception to the restrictions imposed by Section 5A(1).

Although non-judge candidates for appoint-

ive judicial office are permitted during candidacy to retain office in a political organization, attend political gatherings and pay ordinary dues and assessments, they remain subject to other provisions of this Code during candidacy. See Sections 5B(1), 5E and Application Section.

**C. Judges and Candidates Subject to Public Election.**

- 1. A judge or a candidate\* subject to public election\* [except for retention elections] may, except as prohibited by law\*:
  - a. purchase tickets for and attend political gatherings;
  - b. speak to such gatherings on his or her own behalf when a candidate for election;
  - c. identify himself or herself as a member of a political party;
  - d. contribute to a political party or organization\*<sup>2</sup>; and

See Terminology, "law."

See Terminology, "candidate."

See Terminology, "political organization."

See Terminology, "public election."

- e. publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.

**ABA Commentary:**

Section 5C(1) provides a limited exception to the restrictions imposed by Section 5A(1).

- 2. A candidate\* shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees of responsible persons to solicit and accept reasonable campaign contributions, to manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees may solicit and accept reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [one year] before an elec-

tion and no later than [90] days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

**ABA Commentary:**

Section 5C(2) permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. At the start of the campaign, the candidate must instruct his or her campaign committees to solicit or accept only contributions that are reasonable under the circumstances.

Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible.

See Terminology, "candidate."

Section 5C(2) does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

3. Except as prohibited by law\*, a candidate\* for judicial office in a public election\* [except in retention elections] may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.

**ABA Commentary:**

Section 5C(3) provides a limited exception to the restrictions imposed by Section 5A(1).

D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law\*, the legal system or the administration of justice, or (iii) as expressly authorized by law\*.

**ABA Commentary:**

This Section does not prohibit a judge from engaging in the activities permitted under Section 4C(1).

E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates\*. A successful candidate, whether or not an incumbent, is

subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to [Rule 8.2(b) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule.)

See Terminology, "law."

See Terminology, "candidate."

See Terminology, "public election."

### **Application of the Code of Judicial Conduct**

A. Anyone, whether or not a lawyer, who is an officer of a judicial system<sup>1</sup> and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.<sup>1</sup> Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction. Administrative law judges generally are affiliated with the executive branch of government rather than the judicial branch and each adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the Code for administrative law judges. See, e.g., *Model Code of Judicial Conduct for Federal Administrative Law Judges*, endorsed by the National Conference of Administrative Law Judges in February 1989.

**ABA Commentary:**

The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this Section, as long as a retired judge is subject to recall the judge is considered to "perform judicial functions." The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

B. Retired Judge Subject to Recall. A retired judge subject to recall who by law is not permitted to practice law is not required to comply:

1. except while serving as a judge, with Section 4F; and
2. at any time with Section 4E.

**C. Continuing Part-time Judge.** A continuing part-time judge\*:

1. is not required to comply
  - a. except while serving as a judge, with Section 3B(9); and
  - b. at any time with Sections 4C(2), 4D(3), 4E(1), 4F, 4G, 4H, 5A(1), 5B(2) and 5D.
2. shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

**ABA Commentary:**

When a person who has been a continuing part-time judge is no longer a continuing part-time judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to [Rule 1.12(a) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule).

**D. Periodic Part-time Judge.** A periodic part-time judge\*:

1. is not required to comply
  - a. except while serving as a judge, with Section 3B(9);
  - b. at any time, with Sections 4C(2), 4C(3)(a), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5B(2) and 5D.
2. shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

See Terminology, "continuing part-time judge."

See Terminology, "periodic part-time judge."

**ABA Commentary:**

When a person who has been a periodic part-

time judge is no longer a periodic part-time judge (no longer accepts appointments), that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to [Rule 1.12(a) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule).

**E. Pro Tempore Part-time Judge.** A pro tempore part-time judge\*:

1. is not required to comply
  - a. except while serving as a judge, with Sections 2A, 2B, 3B(9) and 4C(1);
  - b. at any time with Sections 2C, 4C(2), 4C(3)(a), 4C(3)(b), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5A(2), 5B(2) and 5D.
2. A person who has been a pro tempore part-time judge\* shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by [Rule 1.12(a) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule.)

**F. Time for Compliance.** A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3) and 4E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

See Terminology, "pro tempore part-time judge."

**ABA Commentary:**

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.

## APPENDIX

### Judicial Ethics Committee

A. The [chief judge of the highest court of the jurisdiction] shall appoint a Judicial Ethics Committee consisting of [nine] members. [Five] members shall be judges; [two] members shall be non-judge lawyers; and [two] members shall be public members. Of the judicial members, one member shall be appointed from each of [the highest court, the intermediate levels of courts, and the trial courts]. The remaining judicial members shall be judges appointed from any of the above courts, but not from the [highest court of the jurisdiction]. The [chief judge] shall designate one of the members as chairperson. Members shall serve three-year terms; terms shall be staggered; and no individual shall serve for more than two consecutive terms.

B. The Judicial Ethics Committee so established shall have authority to:

1. by the concurrence of a majority of its members, express its opinion on proper judicial conduct with respect to the provisions of [the code of judicial conduct adopted by the jurisdiction and any other specified sections of law of the jurisdiction regarding the judiciary, such as financial reporting requirements], either on its own initiative, at the request of a judge or candidate for judicial office, or at the request of a court or an agency charged with the administration of judicial discipline in the jurisdiction, provided that an opinion may not be issued on a matter that is pending before a court or before such an agency except on request of the court or agency;
2. make recommendations to [the highest court of the jurisdiction] for amendment of the Code of Judicial Conduct [of the jurisdiction]; and
3. adopt rules relating to the procedures to be used in expressing opinions, including rules to assure a timely response to inquiries.

C. A judge or candidate for judicial office as defined in the Terminology Section of this Code who has requested and relied upon an opinion may not be disciplined for conduct conforming to that opinion.

D. An opinion issued pursuant to this rule shall be filed with [appropriate official of the judicial conference of the jurisdiction]. Such an opinion is confidential and not public information unless [the highest court of the jurisdiction] otherwise directs. However, the [appropriate official of the judicial conference of the jurisdiction] shall cause an edited version of each opinion to be prepared, in which the identity and geographic location of the person who has requested the opinion, the specific court involved, and the identity of other individuals, organizations or groups mentioned in the opinion are not disclosed. Opinions so edited shall be published periodically in the manner [the appropriate official of the judicial conference of the jurisdiction] deems proper.

## **ABA Code of Judicial Conduct (1990) (Without Commentary)**

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### **CANON 1: A Judge Shall Uphold the Integrity and Independence of the Judiciary**

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

### **CANON 2: A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities**

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

### **CANON 3: A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**

A. **Judicial Duties in General.** The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

#### **B. Adjudicative Responsibilities.**

- (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.
- (2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
- (3) A judge shall require order and decorum in proceedings before the judge.
- (4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.
- (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit



staff, court officials and others subject to the judge's direction and control to do so.

- (6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.
- (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
  - (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
    - (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
    - (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
  - (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
  - (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
  - (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
  - (e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.
- (8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.
- (9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.
- (10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.
- (11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

**C. Administrative Responsibilities.**

- (1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and

should cooperate with other judges and court officials in the administration of court business.

- (2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.
- (3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.
- (4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

#### D. Disciplinary Responsibilities.

- (1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office, the judge shall inform the appropriate authority.
- (2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, the judge shall inform the appropriate authority.
- (3) Acts of a judge in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

#### E. Disqualification.

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
  - (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
  - (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;
  - (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
    - (i) is a party to the proceeding, or an officer, director or trustee of a party;
    - (ii) is acting as a lawyer in the proceeding;

- (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
  - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.
- (2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

**F. Remittal of Disqualification.**

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

**CANON 4: A Judge Shall So Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations**

**A. Extra-judicial Activities in General.** A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

**B. Avocational Activities.** A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

**C. Governmental, Civic or Charitable Activities.**

- (1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.
- (2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.
- (3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.
  - (a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:
    - (i) will be engaged in proceedings that would ordinarily come before the judge; or
    - (ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of

the court of which the judge is a member.

- (b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:
  - (i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;
  - (ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;
  - (iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;
  - (iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

D. Financial Activities.

- (1) A judge shall not engage in financial and business dealings that:
  - (a) may reasonably be perceived to exploit the judge's judicial position, or
  - (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.
- (2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.
- (3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:
  - (a) a business closely held by the judge or members of the judge's family, or
  - (b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.
- (4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.
- (5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept a gift, bequest, favor or loan from anyone except for:
  - (a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;
  - (b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or

other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

- (c) ordinary social hospitality;
- (d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;
- (e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;
- (f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;
- (g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or
- (h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H.

#### E. Fiduciary Activities.

- (1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.
- (2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
- (3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

#### H. Compensation, Reimbursement and Reporting.

- (1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.
  - (a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.
  - (b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.
- (2) Public Reports. A judge shall report the date, place and nature of any activity for which

the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.

## **CANON 5: A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity**

**Introductory Note to Canon 5:** There is wide variation in the methods of judicial selection used, both among jurisdictions and within the jurisdictions themselves. In a given state, judges may be selected by one method initially, retained by a different method, and selected by still another method to fill interim vacancies.

According to figures compiled in 1987 by the National Center for State Courts, 32 states and the District of Columbia use a merit selection method (in which an executive such as a governor appoints a judge from a group of nominees selected by a judicial nominating commission) to select judges in the state either initially or to fill an interim vacancy. Of those 33 jurisdictions, a merit selection method is used in 18 jurisdictions to choose judges of courts of last resort, in 13 jurisdictions to choose judges of intermediate appellate courts, in 12 jurisdictions to choose judges of general jurisdiction courts and in 5 jurisdictions to choose judges of limited jurisdiction courts.

Methods of judicial selection other than merit selection include nonpartisan election (10 states use it for initial selection at all court levels, another 10 states use it for initial selection for at least one court level) and partisan election (8 states use it for initial selection at all court levels, another 7 states use it for initial selection for at least one level). In a small minority of the states, judicial selection methods include executive or legislative appointment (without nomination of a group of potential appointees by a judicial nominating commission) and court selection. In addition, the federal judicial system utilizes an executive appointment method. See *State Court Organization 1987* (National Center for State Courts, 1988).

### **A. All Judges and Candidates**

- (1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:
  - (a) act as a leader or hold an office in a political organization;
  - (b) publicly endorse or publicly oppose another candidate for public office;
  - (c) make speeches on behalf of a political organization;
  - (d) attend political gatherings; or
  - (e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.
- (2) A judge shall resign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.
- (3) A candidate for a judicial office:
  - (a) shall maintain the dignity appropriate to judicial office, and act in a manner consistent with the integrity and independence of the judiciary and shall encourage members of the candidate's family to adhere to the same standards of political

- conduct in support of the candidate that apply to the candidate;
- (b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;
  - (c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;
  - (d) shall not:
    - (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
    - (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or
    - (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;
  - (e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

**B. Candidates Seeking Appointment to Judicial or Other Governmental Office**

- (1) A candidate for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.
- (2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:
  - (a) such persons may:
    - (i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;
    - (ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and
    - (iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office;
  - (b) a non-judge candidate for appointment to judicial office may, in addition, unless otherwise prohibited by law:
    - (i) retain an office in a political organization;
    - (ii) attend political gatherings; and
    - (iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.

**C. Judges and Candidates Subject to Public Election**

- (1) A judge or a candidate subject to public election may, except as prohibited by law:
  - (a) at any time
    - (i) purchase tickets for and attend political gatherings;
    - (ii) identify himself or herself as a member of a political party; and

- (iii) contribute to a political organization;
- (b) when a candidate for election
  - (i) speak to gatherings on his or her own behalf;
  - (ii) appear in newspaper, television and other media advertisements supporting his or her candidacy;
  - (iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy; and
  - (iv) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.
- (2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [one year] before an election and no later than [90] days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.
- (3) Except as prohibited by law, a candidate for judicial office in a public election may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.

D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law, the legal system or the administration of justice, or (iii) as expressly authorized by law.

E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to [Rule 8.2(b) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule.)

### Application of the Code of Judicial Conduct

- A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.
- B. Retired Judge Subject to Recall. A retired judge subject to recall who by law is not permitted to practice law is not required to comply:
  - (1) except while serving as a judge, with Section 4F; and
  - (2) at any time with Section 4E.
- C. Continuing Part-time Judge. A continuing part-time judge:
  - (1) is not required to comply;



- (a) except while serving as a judge, with Section 3B(9); and
  - (b) at any time with Section 4C(2), 4D(3), 4E(1), 4F, 4G, 4H, 5A(1), 5B(2) and 5D.
- (2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.
- D. **Periodic Part-time Judge.** A periodic part-time judge:
- (1) is not required to comply:
    - (a) except while serving as a judge, with Section 3B(9);
    - (b) at any time, with Sections 4C(2), 4C(3)(a), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5B(2) and 5D.
  - (2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.
- E. **Pro Tempore Part-time Judge.** A pro-tempore part-time judge:
- (1) is not required to comply
    - (a) except while serving as a judge, with Sections 2A, 2B, 3B(9) and 4C(1);
    - (b) at any time with Section 2C, 4C(2), 4C(3)(a), 4C(3)(b), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5A(2), 5B(2) and 5D.
  - (2) A person who has been a pro tempore part-time judge shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by [Rule 1.12(a) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule.)
- F. **Time for Compliance.** A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3) and 4E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

# **National College of Juvenile and Family Law Key Issues Curriculum Enhancement Project Faculty Consortium**

**Members:** Jerry L. Mershon (Chairman) Administrative District Judge, 21st Judicial District, Manhattan, KS; Michael J. Anderegg, Marquette County Probate and Juvenile Court, Marquette, MI; Maurice B. Cohill, Jr., Chief Judge, United States District Court, Pittsburgh, PA; Leonard P. Edwards, Presiding Judge, Superior Court, Juvenile Division, San Jose, CA; Richard J. FitzGerald, Jefferson County District Court, 30th Judicial District, Louisville, KY; Randall J. Heckman, Kent County Juvenile Court, Grand Rapids, MI; Thomas E. Hornsby, 15th Judicial Circuit, Juvenile Court, Lee County Courthouse, Dixon, IL; Nancy Amato Konrad, Jefferson Juvenile Court, Parish of Jefferson, Gretna, LA; David B. Mitchell, Presiding Judge, Division for Juvenile Causes, Circuit Court, Baltimore, MD; Gerald E. Radcliffe, Ross County Courthouse, Chillicothe, OH; Marshall P. Young, 7th Judicial Circuit, Rapid City, SD.

**Ex-Officio:** Lindsay G. Arthur, Senior Judicial Scholar, NCJFCJ; Louis W. McHardy, Executive Director, NCJFCJ; Dean, National College of Juvenile and Family Law, Reno, NV.

**Project Staff:** (NCJFCJ-Reno) M. James Toner, Associate Director for Training; Arne Schoeller, Associate Director for Planning and Development; Hunter Hurst, Director, National Center for Juvenile Justice; Linda Szymanski, Director of Legal Research, NCJJ, Project Attorney/Manager.